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IN THE

Supreme Court of the United States

October Term, 1956

No. 902

ABE IVICOLA, ANGELO CHIEPPA, ANTHONY PETTI, and JOSEPH D. POLVERINO,
Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1-2
Questions Presented	2-3
Statutes Involved	3
Statement	3
The Pertinent Facts	5
Reasons for Granting the Writ	12
Conclusion	23
Appendix:	
Statutes Involved	25
Opinion Below	31
Opinion on Rehearing	41
Judgment	42

Cases Cited

Agnello v. United States, 269 U. S. 20	19
Berger v. United States, 295 U. S. 78	13
Bihn v. United States, 328 U. S. 633 (1946)	13
Bollenbach v. United States, 326 U. S. 607 (1946)	13
Bruno v. United States, 308 U. S. 287	13
Contee v. United States, 215 F. 2d 324 (1954)	16
Gambino v. United States, 275 U. S. 310	19
Gouled v. United States, 255 U. S. 298	16
Harris v. United States, 331 U. S. 145	19
Hester v. United States, 265 U. S. 57	18
In re Ginsburg, 147 F. 2d 749 (2 C., 1945)	19
Johnson v. United States, 333 U. S. 10	17, 18
Kotteakos v. United States, 328 U. S. 750 (1946)	13, 14
Krulewitch v. United States, 336 U. S. 440 (1949)	13, 15

PAGE

McDonald v. United States, 335 U. S. 451 .....2, 18, 21
McGinnis v. United States, 227 F. 2d 598 (1 C., 1955) 18
Nelson v. United States, 208 F. 2d 505 (C/A, D. C., 1953), cert. den. 346 U. S. 827 21
Trupiano v. United States, 334 U. S. 699 18
Walker v. United States, 225 F. 2d 447 (5 C., 1955) 18
Weiler v. United States, 323 U. S. 606 13
Wrightson v. United States, 222 F. 2d 556 (1955) ... 17
United States v. Di Re, 159 F. 2d 818 (2 C.), affd. 332 U. S. 581 ..... 17, 19
United States v. Jeffers, 342 U. S. 48 ..... 18, 21
United States v. Kaplan, 89 F. 2d 869 (2 C.) 18
United States v. Kind, 87 F. 2d 218 (2 C.) 17

Statutes

Sec. 371, Title 18, U. S. C. 3, 26
Sec. 2833, Title 26, U. S. C. 3, 4, 28-29
Sec. 2834, Title 26, U. S. C. 3, 4, 29-30
Sec. 2810, Title 26, U. S. C. 3, 4, 27-28
Sec. 2803(a), Title 26, U. S. C. 3, 4, 26-27
Amendment IV to the Constitution of the United States 2, 10, 12, 15, 16, 18, 21, 30
Amendment V to the Constitution of the United States 2-3, 22-23

Federal Rules of Criminal Procedure

Rule 41(e) 2-3, 12, 15-16, 19, 20, 22, 23
Rule 52(a) 12, 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming petitioners' conviction for several offenses relating to the possession, custody, control, and operation of an unregistered still, and a conspiracy so to do.

Opinion Below

The opinion of the Court of Appeals (R. 87a) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on the 14th day of February, 1957 (R. 98a). It affirmed on all counts. A petition for rehearing, filed February 28, 1957 (R. 99a), was denied by the Court of Appeals on March 11, 1957 (R. 110a). In the same opinion denying

the petition for rehearing, the full Court granted the motion of the petitioners for bail pending application for a writ of certiorari to this Court, and for a stay of the mandate pending such an application. The jurisdiction of this Court is invoked under Title 28, U. S. C., 1254(1); see also Rules 37(b)(2) and 45(a), of the Federal Rules of Criminal Procedure.

Questions Presented

1. Having found that the trial court committed error in the admission of conversations against the petitioners after the conspiracy had ended, was the Circuit Court warranted in holding that the error was "harmless" under Rule 52(a) of the Federal Rules of Criminal Procedure?

2. (a) Was the Circuit Court in error in refusing to pass upon the validity of a "raid" on the private premises of one of the defendants and the ensuing search, seizure, and arrests, all without a search warrant and without any emergency existing, because the defendants had failed to move to suppress the evidence before trial?

(b) Does Rule 41(e) of the Federal Rules of Criminal Procedure sanction a determination that the Constitutional right against unlawful search and seizure has been waived by an inquiry which was limited to only whether a pre-trial motion had been made?

(c) Was the Circuit Court correct in limiting this Court's decision in *McDonald* v. *United States*, 335 U. S. 451, to only a situation where a pre-trial motion to suppress had in fact been made?

3. Did this Court in promulgating Rule 41(e) of the Federal Rules of Criminal Procedure intend that the failure to move to suppress before trial will constitute a "waiver" in a situation where to admit ownership or possession of the property on such a motion would constitute an admission of guilt of the criminal charge? If so, does Rule 41(e) as

so interpreted constitute a denial of due process and a violation of the privilege against self-incrimination under the Fifth Amendment to the Constitution?

Statutes Involved

See Appendix:

Federal Rules of Criminal Procedure:
- Rule 41(e)
- Rule 52(a)

Title 18, U. S. C.:
- Section 2
- Section 371

Title 26, U. S. C.:
- Section 2803(a)
- Section 2810
- Section 2833
- Section 2834

Amendment IV to the Constitution of the United States

Statement

On November 7, 1955, in the United States District Court, Southern District of New York, the petitioners were indicted in an indictment consisting of five counts (1a)*. Count 1 charged all of the petitioners from on or about July 1, 1953 with a conspiracy to violate Sections 2833, 2810, 2834 and 2803(a) of Title 26, U. S. C., in that they would carry on the business of a distiller without giving bond, would have in their possession, custody, and control an unregistered still, would make and ferment mash fit for

* These record references relate to the petitioners' appendix to the brief. References to the Government's appendix are indicated by the letter "G". References to the transcript of the testimony are indicated by the letters "Tr".

distillation and for the production of spirits and alcohol in a building and premises other than a distillery authorized by law, and would possess quantities of distilled spirits without stamps (G. 1a-4a). Count 2 charged the petitioners with the offense of carrying on the business of a distiller without bond (*ibid.* 4a). Count 3 charged petitioners Chieppa and Polverino with having in their possession, custody and control an unregistered still on August 18, 1953 (*ibid.* 4a-5a). Count 4 charged petitioners Chieppa and Polverino with making and fermenting approximately 34,824 gallons of mash for the production of alcohol on August 18, 1953 (*ibid.* 5a). Count 5 charged petitioners Chieppa and Polverino with possession of fifty 5-gallon cans of alcohol without stamps on August 18, 1953 (*ibid.* 5a-6a).

Petitioner Chieppa was convicted of all five counts and sentenced to two years imprisonment on all five counts to run concurrently, a fine of $1,000 on Count 2, a fine of $100 on Count 3 together with a $500 penalty on Count 3, and a $500 fine on Count 4, the fines to be cumulative (3a). Petitioner Ivicola was convicted of Counts 1 and 2 and was sentenced to two years imprisonment on Count 1, and two years imprisonment on Count 2, and a fine of $1,000, the prison sentence to run concurrently (4a). Petitioner Polverino was convicted of all five counts and was sentenced to two years imprisonment on all five counts to run concurrently, $100 fine on Count 2, $100 fine on Count 3, $500 on Count 4 and a penalty of $500, the fines to be cumulative (3a). Petitioner Petti was convicted of Counts 1 and 2 and was sentenced to eighteen months imprisonment on both counts to run concurrently, and a fine of $100 on Count 2 (3a).

The Pertinent Facts

(a) The Harmless Error

The error that the Circuit Court found existed below consisted of testimony of Government witness Jones that about four nights after the "raid" on the premises on August 18, 1953, and after the conspiracy had ended, petitioner Ivicola, accompanied by petitioner Petti, told Jones not to talk to any Federal agents and that he would be taken care of (48a-49a). This statement was admitted against petitioners Chieppa and Polverino over their objection (49a).

In determining that there was harmless error below, the Circuit Court said that the Government's case was overwhelming and that the "record fairly shrieks the guilt" of all the petitioners. The Circuit Court held that the single reference by Jones to the efforts of the two petitioners to suppress evidence of their activities did not affect the substantial rights of the two petitioners who were not present, and that its admission, therefore, was "harmless error". However, the Circuit Court overlooked completely in its opinion a second and more damaging conversation which was admitted against all petitioners, and which likewise took place some time after the "raid" on August 18, 1953.

Jones was questioned by the Assistant United States Attorney as follows:

> "Q. What was your discussion with Mr. Clemens on this subject and when did that take place? A. It took place on the same week, the weekend I am quite sure. I was a little shaky about the matter. I asked Mr. Clemens what he thought of the situation I was in. He said it would only be a matter of a year in prison and if I should talk to the agents, the hoodlums were a bad bunch." (50a)

This statement was objected to and a motion for a mistrial made, but was denied (48a, 49a, 50a). In the petition for rehearing, this was called to the Circuit Court's attention as having been overlooked (R. 99a). The Circuit Court denied the petition for rehearing (R. 110a).

(b) The Government's Case

The Government's case was predicated principally upon the testimony of Joseph J. Jones, who had been employed as a caretaker at the defendant Indian Hill Farms, Inc. (G. 14a). Jones identified all of the petitioners as individuals who had come to the farm to set up a distillery and operate it. Petitioner Ivicola told Jones they were going to make some "apple" (G. 18a). At Ivicola's direction, Jones removed the hay from the barn and assisted in other ways (G. 21a, 34a). Jones indicated that petitioner Ivicola told him petitioner Chieppa was the foreman at the place (G. 45a). Jones witnessed the building of the still and ran errands for some of the materials that had to be purchased to construct parts of the still (G. 34a). Petitioners Polverino and Petti were among the men Jones saw assist in unloading sugar at the premises where the still was built (G. 51a, 42a). Jones also saw 5-gallon cans of alcohol being loaded by some men, including petitioner Petti (G. 42a).

A State trooper testified that a truck loaded with sugar drove on the premises about 12:30 A. M. on the day of the "raid", but drove on toward the woods ignoring the State trooper's command to stop, where the driver abandoned the truck and escaped (G. 9a). Telephone Company records were put in evidence by the Government showing that calls had been placed to petitioner Chieppa at the telephone number of the owner of the truck which had carried the sugar (G. 55a, 56a), and from that number to the number of the metal worker who constructed the still column (G. 50a, 51a, 34a). Their telephone records showed that a

number of calls had been exchanged between the numbers of defendant Clemens (deceased) and petitioner Ivicola (G. 55a, 56a). Treasury Agent Fili testified that he visited the Clemens residence on the day after the raid and that the Clemens denied knowing anything about the still, and produced a document purporting to be a lease of the barn from Indian Hill Farms to a Mr. and Mrs. Gerard P. Evans, but no one by that name was known, said Agent Fili, at the address given for Evans, and an intensive search failed to locate them (G. 58a, 59a).

In indicating the overwhelming nature of the evidence in the record and the guilt of the petitioners, the Circuit Court overlooked the fact that the Government witness Joseph J. Jones was the witness who identified all of the petitioners, and without whose testimony the other links would have been completely insufficient to establish guilt. None of the petitioners was on the premises at the time of the raid (33a). Indeed the Circuit Court indicated that Jones' testimony "* * * was not effectively impeached by defense counsel, * * *"; but what the Court overlooked is that Jones had given a prior statement (Defts' Ex. 1) which completely contradicted his testimony on the stand with regard to the still itself and the participation of the petitioners (Tr. 417). Moreover, during his Army period, he was treated for nervous disorders in the Army General Hospital (Tr. 403). He was AWOL and was court-martialed (Tr. 402). He mistook defense counsel John T. Mazzeo for a Mr. Louis Werner on a visit to him on August 30, 1953 (Tr. 407, 412, 418-419). He identified a spectator in the court room for one of the defendants (Tr. 228-232, 234-237). Jones was anything but a believable witness.

The other proof by the Government consisted of the results of the alleged unlawful search and seizure.

(c) The Search, Seizure, and Arrests

Defendant Indian Hill Farms, Inc. owned the property on which the still was found (52a). The farm consisted of 481 acres and was located in the County of Orange, New York, a few miles from Southfields, New York (53a, 5). The president and owner of the Indian Hill Farms Corporation was Michael Clemens, a defendant, who died a year before the trial. The Orange Turnpike, a main highway, ran past the entrance to the farm (29a). The first building inside the farm from the main highway was 5/8 of a mile away (30a), and it was a two-story dwelling house occupied by defendant, Michael Clemens, and his wife. Further into the premises was a two-story tenant house (31a). Beyond this was a small tenant house and a barn containing the still, some 1200 feet from the two-story tenant house (31a-32a). Past the barn, the road continued down to a lake (32a). The barn was previously used to store hay (44a).

On August 18, 1953, Agent Lane of the Alcohol Tax Unit was instructed by Agent O'Dee, of the same Agency, to appear at the Newburgh office of the Alcohol Tax Unit between 2:00 and 3:00 o'clock in the morning of August 18, 1953 (37a-38a). At 6:30 A. M. on that day, in the company of others, including State troopers and other agents of the Alcohol Tax Unit, he came into the farm from Orange Turnpike, through the front private entrance (5a, 29a), past the main two-story dwelling, the larger tenant house, and stopped his car near the barn, behind another agent's car (31a-32a). As Agent Lane put it, "I was in a Government car with Trooper Urey and Investigator Curran and I drove right up to the direction of the barn on the rear of the premises" (29a).

When his car approached the small tenant house, defendant Falanga * was seen running from the tenant house

* Pleaded guilty upon the commencement of trial (2a).

towards the barn and up a hillside (6a). Agents Fili, Fells, and Fitzpatrick pursued him (6a). Another defendant, Siematowski,* was then seen coming out of the barn and running in the same direction as defendant Falanga (6a). At this point, there is no indication in the record as to what, if anything, both defendants were running from. There is no evidence to indicate that the Government cars were distinguished by any identifiable Government marks. There is no evidence to indicate that the two defendants knew these were police officers. There is no evidence to indicate that the agents knew why they were running.

Agent Lane then got out of his car and smelled a strong odor of fermenting mash and cooking alcohol about the area (6a). He saw vapors arising from the ground near the barn (7a). *He then walked to the large front door of the barn, opened the door, looked in, went inside the barn, and found a copper column still, a number of 5-gallon cans, and saw alcohol running into a large receiving tank* (7a). He then took after the agents and defendants Falanga and Siematowski, who were heading toward the lake. Agent Lane crossed a barbed wire fence which apparently marked the end of the property and caught up with the two men and then placed them under arrest (7a).

About 11:00 o'clock that morning, Trooper Urey signaled a Ford car to stop, which was coming up the intersection on the farm premises heading toward the rest of the buildings and property (41a, 43a). *In the car were petitioners Chieppa and Polverino, who identified themselves by their true names* (42a). *Trooper Urey directed petitioner Chieppa, who was driving, to drive the car to where the others were being held* (42a). *He then turned them over to Agents Lane and O'Dec, and Agent Lane placed them both "under arrest for the still found at the place • • •"* (24a). *Agent Lane then searched the interior of the car and the trunk of the car.* On the floor of the car between both seats was a carton which contained a can of

soda and various plumbing fittings (21a, 22a). In the trunk of the car he found a "couple more cans and a length of rubber hose" (22a). At the trial, Agent Lane testified, over objection, that these articles in his experience were of a type used in distilleries (23a, 24a). He conceded on cross-examination that all of these articles were useful in legitimate occupations, such as for plumbing in the home or in an industrial building of any sort, or in the fuel oil business, and that the soda had various legitimate uses (35a, 36a, 37a). When questioned at this time, petitioner Chieppa told Agent Lane that he drove on to the premises with the car which he borrowed for the purpose of taking a ride (24a). Outside of his personal history, petitioner Chieppa said nothing else, said Agent Lane (24a). However, on cross-examination Agent Lane stated that petitioner Chieppa told him that Chieppa was employed by a fuel oil outfit (36a). Petitioner Polverino, when questioned by Agent Lane, said he was merely taking a ride with Chieppa, and then answered questions concerning his personal history (24a-25a). Petitioners Ivicola and Petti were arrested some time thereafter, apparently not on the premises.

None of the agents had a search warrant or a warrant of arrest.

Upon the trial, counsel for the owner of the premises, defendant Indian Hill Farms, Inc., upon the introduction of certain exhibits by the prosecution, sought to examine Agent Lane on the "voir dire" in the absence of the jury to determine whether there was an unlawful entry and seizure (7a-8a). The trial court denied this, stating:

> "*I know of no rule of law which would prevent Federal agents or anyone else from testifying to what he saw inside the building even if the entry into the building was illegal.* This might affect a seizure of property inside the building. But he hasn't testified

that he seized anything and nothing that he seized has been offered in evidence." (8a) (Emphasis supplied.)

Thereafter, the same counsel objected to the introduction of Government Exhibit 2-A (a photograph of the interior of the barn showing the still), 2-B (a photograph showing three of the mash vats found in the barn), 2-C (a photograph showing two of the vats full of mash), and 2-D (a photograph showing a mixing vat, etc.), on the ground that these exhibits were obtained as a result of an unlawful search (13a). The trial court overruled the objection again on the ground that there has been no proof of a seizure and that even if there were and the seizure was illegal, a motion to suppress should have been made before trial (14a). Notwithstanding the statement of the trial court, Agent Lane testified there was a seizure at the distillery and he assisted in making it (29a).

Over the objection of counsel for petitioner Chieppa, Agent Lane was permitted to testify as to the objects found in the car driven by petitioner Chieppa, in which petitioner Polverino was an occupant, on the day of the raid, and to further testify that these objects "are used in distilleries" (21a-22a). Agent Lane was also permitted to testify, over objection, that he took samples of alcohol and mash from the vats in the barn and he gave them to a chemist for analysis (19a-20a). Government chemist Milos later testified these samples indicated the mash was suitable for distillation, and the alcohol was fit for beverage purposes (46a).

The trial court precluded any cross-examination of Agent Lane as to the circumstances which led to the raid because (a) what passed between Agent Lane and his superior officers and what instructions he received could not be inquired into (b) the arrests here were proper because there was a reasonable basis, and (c) there is no

question in this case concerning a search and seizure since a motion was not made before trial (38a, 39a, 40a). The trial court also precluded counsel for the owner of the premises from cross-examining Agent Fili concerning the seizure on the premises as not within the scope of direct examination (51a).

Although the trial court held that the petitioners had waived the claim of an unlawful search and seizure in not moving before trial, he made it clear that even if it had not been waived, the search was justified because " * * * the officer smelled mash and that gave him reasonable grounds * * * " and, further, "this was not an entry into a home; it was an entry into an outhouse" (59a).

The Circuit Court declined to review the alleged unconstitutional search and seizure or the propriety of the trial court's action in overruling the objections to this evidence because petitioners had sufficient knowledge and opportunity to make a timely motion under Rule 41(e) of the Federal Rules of Criminal Procedure to suppress the evidence before trial, and that the trial court properly declined to exercise his discretion. *The Circuit Court so held notwithstanding the absence of any such finding by the trial court, and further notwithstanding its assertion in the opinion that the Government upheld the search of the barn on the merits as incidental to a lawful arrest.*

Reasons for Granting the Writ

1.

The "Harmless Error"

The second Circuit Court extended Rule 52(a) of the Federal Rules of Criminal Procedure beyond what Congress ever intended, and beyond what this Court ever has sanctioned. In at least six decisions, this Court has reversed the Second Circuit Court of Appeals on the same issue of

harmless error. *Krulewitch* v. *United States,* 336 U. S. 440 (1949); *Kotteakos* v. *United States,* 328 U. S. 750 (1946); *Bollenbach* v. *United States,* 326 U. S. 607 (1946); *Bihn* v. *United States,* 328 U. S. 633 (1946); *Bruno* v. *United States,* 308 U. S. 287; *Berger* v. *United States,* 295 U. S. 78. This Court has repeatedly indicated that where error below is found, the inquiry should not be merely whether there was enough evidence to support the verdict, and, further, that it is not the function of a Circuit Court to determine the guilt or innocence of the defendants notwithstanding the error. *Kotteakos* v. *United States, supra,* p. 763; *Weiler* v. *United States,* 323 U. S. 606, 611.

> "* * * the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials * * *." *Bollenbach* v. *United States, supra,* p. 614.

The sole inquiry to be made is the impact on the jury's mind of the error committed and not what effect it might have on the minds of the Circuit Court. *Kotteakos* v. *United States, supra,* at page 764.

These principles were not followed by the Second Circuit in this case any more than they have been followed in the other cases reversed by this Court. Nowhere does the Circuit Court attempt to determine the impact the erroneous statements, as such, could have had on the jury. It merely reviewed the evidence and came to the conclusion that:

> "Because we believe that no reasonable jury could have acquitted the appellants on the basis of the evidence presented below, we hold that the admission of this conversation against all of the appellants was a 'harmless error'."

While this holding was made with regard to the "single" conversation found to be erroneous, and not as to the other

conversation overlooked, the standard applied is clearly at variance with the principles announced by this Court. In *Kotteakos* v. *United States, supra,* at page 765 the Court stated:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The nature and content of these conversations were explosive. In the first conversation Jones was told not to talk to the Federal agents who raided the farm, and that he will be taken care of. The jury was justified in inferring from this statement, since it was admitted as to all the petitioners, that Jones would be bribed or paid off by all of them. Admitted against all, such evidence of an attempt to conceal the crime by bribery was extremely powerful evidence. But, the impact of that conversation on the jury was multiplied many times by the later conversation between the defendant Clemens (deceased) and Jones. It was reasonable for the jury to infer that the business-like approach in the first conversation had not convinced Jones. The second conversation revealed a clear implication that petitioners would attempt physical violence, if he decided to talk to the Federal agents. The testimony further characterized petitioners as "hoodlums" and a "bad bunch". Equally damaging was the inference in the conversation that petitioners were all guilty of the crime charged. This would appear from Clemens' statement to Jones that Jones would only get a year in prison.

If these statements be considered "harmless" and merely "technical", then the principles repeatedly laid down by this Court in the cases cited are meaningless. *The Second Circuit must not be permitted to give lip service to*

the force of this Court's opinion in Krulewitch v. *United States, 336 U. S. 440, but then to effectively disregard it by holding under the circumstances that it was "harmless".*

Jones was very effectively impeached and discredited by his prior contradictory statement denying any knowledge of who ran the still, by his previous treatment for nervous disorders in the Army General Hospital, and his court-martial after going AWOL. There was proof of the still obtained by the raid and search. But none of petitioners was present. Without Jones' testimony, there was nothing upon which the petitioners could be convicted. The Government's case does not support the conclusion of the Circuit Court that the "record fairly shrieks the guilt" of the petitioners. Upon analysis, that statement is wholly without foundation. The error was hightly prejudicial and had to affect the result.

Unless the Second Circuit is limited in its application of Rule 52 of the Federal Rules of Criminal Procedure to merely "technical errors", as this Court interpreted its predecessor section in *Kotteakos* v. *United States, supra,* at page 760, the rule will become an open invitation to disregard a defendant's Constitutional right to a fair and impartial trial.

The issue thus presented is an important question in the proper administration of criminal trials in the Southern District of New York, and elsewhere, which it is respectfully submitted should be decided.

2.

(a) The refusal to pass upon the validity of the "raid" and the ensuing search and arrests.

Equally, if not more, substantial is the refusal of the Circuit Court to rule upon the validity of the alleged unlawful raid and search of the barn and the arrests which followed thereafter. Rule 41(e) of the Federal Rules of

Criminal Procedure is a rule of practice about which this Court stated, in *Gouled* v. *United States,* 255 U. S. 298, 313:

> "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

The trial court in overruling the objections to the admission of the results of the alleged unlawful search and seizure without any attempt to inquire into why the motion was not made before trial substantially removed the exceptions to making such a motion before trial provided in Rule 41(e) of the Federal Rules of Criminal Procedure. The rule specifically excuses such a motion before trial where no opportunity presented itself, or where the defendant was not aware of the grounds, for the motion. In upholding the action of the trial court in this regard, the Circuit Court, in its interpretation of Rule 41(e), is in conflict with the Court of Appeals of the District of Columbia in *Contee* v. *United States,* 215 F. 2d 324 (1954).* The Court of Appeals for the District of Columbia refused to uphold the decision of the trial court. The trial court had held that the failure to move before trial *without more* constituted a waiver under Rule 41(e). The Circuit Court held that an inquiry should have been made by the trial court before any waiver of such a substantial Constitutional right be determined. The approach to the exceptions in Rule 41(e) by the Second Circuit is completely contrary.

Moreover, the Second Circuit Court refused to consider that the trial court had held the search and arrests valid on the merits. The trial court had stated that even if it had not been waived, the search was justified because "the officer smelled mash and that gave him reasonable grounds to believe" (59a), and further, "this was not an entry into a home; it was an entry into an outhouse" (59a), and further,

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* It is significant that Judge Holtzoff, the trial judge regularly sitting in the District of Columbia, apparently disregarded his own Circuit Court's ruling on the question in holding as he did sitting as a judge in this case in the Southern District of New York.

"Moreover, the point itself, even if open, is lacking in merit" (59a). This was a sufficient indication by the trial court that regardless of any waiver, he was making a determination on the merits.

There is conflict in this respect with the decision of the Court of Appeals in the District of Columbia in *Wrightson* v. *United States,* 222 F. 2d 556 (1955), which concluded that an adjudication on the merits prevented a waiver. To indicate that Judge Holtzoff in the instant case determined the search, seizure, and arrest on the merits, petitioners referred to his statement in *Wrightson* v. *United States, supra,* at page 561, on the identical question:

> "The Court (Judge Holtzoff): In any event I hold that the search was legal. *I would not sacrifice anyone's rights because of a technical violation of the rules.*
>
> Mr. Conn: I know you wouldn't.
>
> The Court: *If I thought the evidence was illegally obtained I would exclude it whether the motion was made or not.*
>
> Mr. Conn: That I know, your Honor.
>
> The Court: I hold it was legally obtained." (Emphasis added.)

While Judge Holtzoff did not express himself below as clearly as he did in *Wrightson* v. *United States,* nevertheless his intention to do the same is quite evident. The Second Circuit Court, however, refused to consider whether there was an adjudication on the merits notwithstanding a contrary holding of its own in *United States* v. *Di Re,* 159 F. 2d 818, 820 (2 C.), affd. 332 U. S. 581.

The "raid" on the farm at 6:30 o'clock in the morning was wholly unjustified and without emergency. *Johnson* v. *United States,* 333 U. S. 10; *United States* v. *Kind,* 87 F. 2d 318 (2 C., 1937). In a farm as large as this, the agents went more than one mile into the grounds, past two of the

main buildings, and directly to a place short of the barn where the still was located. For many hours before the "raid", arrangements had been made to do so, during which interval a search warrant could have easily been obtained. It requires little imagination to infer that the agents had been on the premises before and knew exactly where to go, and that they had good information as to when the still would be in operation. The barn was an adjunct of the farm. Government witness Jones himself testified that prior to the construction of the still the barn was used to store hay. Indeed, he removed the hay in order to make room for the still. It was thus not an "outhouse" as the trial court characterized it. It was a structure clearly within the protection of the Fourth Amendment (*Trupiano* v. *United States*, 334 U. S. 699 (1948); *McGinnis* v. *United States*, 227 F. 2d 598 (1 C., 1955); *Walker* v. *United States*, 225 F. 2d 447 (5 C., 1955), even assuming the private grounds surrounding it may not have been so protected. *Hester* v. *United States*, 265 U. S. 57.

This court has held that the smell of mash is insufficient to justify a search without a warrant. *Johnson* v. *United States*, 333 U. S. 10, 16-17. Moreover, the observations of the agents inside the barn were as much a search and seizure as if they had physically brought the contents into the court room. *Johnson* v. *United States, supra; McGinnis* v. *United States*, 227 F. 2d 598 (1 C., 1955). This court has further indicated that a search without a warrant is today an exception, and the burden is on the agents of the Government who seek an exemption from the application of the Fourth Amendment to show the need for a search without a warrant. *McDonald* v. *United States*, 335 U. S. 451, 460; *United States* v. *Jeffers*, 342 U. S. 48 (1951); *cf. United States* v. *Kaplan*, 89 F. 2d 869 (2 C.).

The arrest of petitioners Chieppa and Polverino and the subsequent search of the car in which they were riding was equally without justification and in violation of their Constitutional rights. The mere presence without more of these

two petitioners on the premises some distance from where the still was operated did not and could not justify an arrest without a warrant for alleged participation in a conspiracy to operate the still, as this Court held in a comparable situation in *United States* v. *Di Re,* 332 U. S. 581. There could be no waiver of their right to suppress the unconstitutionally seized evidence in the car in which they were riding because they had no knowledge whatever that these materials were relevant evidence in the trial of the action. Government Agent Benjamin L. Lane, testifying on cross-examination, indicated that this equipment was equally usable in legitimate industry. None of the materials seized was contraband (*Harris* v. *United States,* 331 U. S. 145, 154; *In re Ginsburg,* 147 F. 2d 749 (2 C., 1945)), and as this Court stated in *Agnello* v. *United States,* 269 U. S. 20, 33, in refusing to uphold a waiver of the right to make the motion at the time of the trial:

> "There is nothing to show that, in advance of its offer in evidence, he (the defendant) knew that * * * the prosecutor intended to introduce evidence of any search or seizure."

Nothing the agents observed or heard upon the premises, so far as this record reveals, justifies their arrest and the subsequent search. *Cf. Gambino* v. *United States,* 275 U. S. 310.

(b) Rule 41(e) of the Federal Rules of Criminal Procedure does not sanction a determination that the Constitutional right against unlawful search and seizure has been waived by an inquiry which was limited to only whether a pre-trial motion had been made.

Strangely enough, the Circuit Court disregarded the apparent invalidity of the search and seizure and upheld the waiver, notwithstanding the fact that the individual who owned the defendant Indian Hill Farms, Inc. died a year

before the trial. Obviously, as the owner of the premises, he was the proper person to bring on the motion. Clearly, the opportunity did not present itself, which is specifically provided as an exception under Rule 41(e) of the Federal Rules of Criminal Procedure. At least, the Circuit Court should have required the trial court under these circumstances to inquire whether the defendant Michael Clemens was so sick prior to his death and for how long a period of time to determine whether he had the capacity and the opportunity to bring on such a motion after the "raid" but before his death; or whether anyone else from the defendant corporation could have done so. The Circuit Court, on the contrary, upheld the waiver on the ground that while Clemens did die a year before the trial, his death occurred two years after the raid "during which time he made no effort to invoke Rule 41(e)". How could there be any evidence in this record as to whether he did have the opportunity to make such an effort, or anyone else, when the trial court effectively prevented any such inquiry?

Furthermore, petitioners were in no position to have any knowledge of the circumstances under which the "raid" occurred. None of the petitioners was present at that time. An inquiry by the trial court might have indicated quite clearly their inability to have the necessary information to file a proper affidavit in support of a motion to suppress evidence. The Circuit Court was incorrect in its opinion in stating that the petitioners' claim that they did not have a sufficient interest in the barn or its contents to invoke Rule 41(e) before trial. In the brief below, petitioners (then appellants) stated at pages 11-12:

> "The evidence unlawfully seized was used not only against the owner of the farm, but against appellants whom the Government charged and proved by the jury verdicts had possession and control of the still * * *. Both the owner of the premises and those in possession and control of the still were

proper parties to bring on the motion to suppress. Appellants Ivicola and Petti, who were not charged with possession and control of the still, are nevertheless protected by prejudicial evidence used against them, obtained as a result of the unlawful search and seizure. *McDonald* v. *United States,* 335 U. S. 451, 456 (1948); *Nelson* v. *United States,* 208 F. 2d 505, 514 (C/A, D. C., 1953), cert. den. 346 U. S. 827."

(c) Was the Circuit Court correct in limiting this Court's decision in *McDonald* v. *United States, supra,* only to a situation where a pre-trial motion to suppress had in fact been made?

The Circuit Court obviously confused the position of the petitioners Ivicola and Petti with that of Chieppa and Polverino. Petitioners advanced *McDonald* v. *United States, supra,* as support for the proposition that if the trial court below was in error in holding on the merits that there did not exist an unlawful search and seizure, then the benefit of such error would apply to all of the petitioners, even assuming petitioners did not have the possessory interest in the still. The Circuit Court, however, construed *McDonald* v. *United States* as applying only where there was in fact a timely motion to suppress before trial. It is submitted that this interpretation improperly limits this Court's holding in *McDonald* v. *United States.* If in fact there was an unconstitutional search and seizure properly raised by the defendant Indian Hill Farms below, *McDonald* v. *United States* would apply to reverse the conviction against petitioners notwithstanding the fact that a pre-trial motion had not been made. Broadly stated, if there was error below in the admission of this evidence, such error would enure to the benefit of the petitioners as well.

This Court held in *United States* v. *Jeffers,* 342 U. S. 48 (1951), which incidentally was called to the attention of the

Circuit Court on the petition for rehearing, that it would not entertain a similar position advanced by the Government. This Court stated:

> "To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right. The respondent unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a property interest therein."

3.

Rule 41(e) Was Never Intended to Compel Petitioners to Make a Motion to Suppress Before Trial Where to Do So Would Require an Admission of Ownership or Possession of the Unlawful Still Charged in the Indictment

The emphasis by the Circuit Court on the rigid requirements of a pre-trial motion points up the conflict that such a position assumes with regard to the Constitutional rights of the petitioners. Even assuming that petitioners had knowledge of the unlawful search and seizure, under the Circuit Court's interpretation petitioners could not successfully maintain a pre-trial motion to suppress unless they affirmatively allege ownership in the property or a possessory interest in the still. The very nature of the charges in the indictment, however, involve a charge of possession, custody, and operation of the still. An admission of such possession would have to be made in the affidavits in support of the motion to suppress. If such a motion were denied, the admissions would constitute an admission of guilt of the charges, admissible against the petitioners in the trial. *If this interpretation of Rule 41(e) is upheld, the Rule becomes a "trap" and would, therefore, be unconsti-*

tutional in violation of due process and the petitioners' privilege against self-incrimination under the Fifth Amendment.

This Court, in promulgating Rule 41(e), merely provided a rule of practice and never intended that the Rule should have such a dangerous and unconstitutional impact.

This issue, thus, presents an interpretation of Rule 41(e) of the Federal Rules of Criminal Procedure contrary to the Rule itself, contrary to the decisions of this Court, and the decisions of another circuit, and which vitally affects the substantial Constitutional rights of the petitioners.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS BENDER,
Attorney for Petitioners.

APPENDIX

Statutes Involved

Rule 41(e), Federal Rules of Criminal Procedure.

"Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Rule 52(a), Federal Rules of Criminal Procedure.

"Harmless Error.

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

§ 2, Title 18, U. S. C.

"Principals.

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

§ 371, Title 18, U. S. C.

"Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

§ 2803(a), Title 26, U. S. C.

"Requirement.

No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this section shall not apply to—

(1) Distilled spirits placed in a container for immediate consumption on the premises or for preparation for such consumption;

(2) Distilled spirits in bond or in customs custody;

(3) Distilled spirits in immediate containers required to be stamped under existing law;

(4) Distilled spirits in actual process of rectification, blending, or bottling, or in actual use in processes of manufacture;

(5) Distilled spirits on which no internal-revenue tax is required to be paid;

(6) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; or

(7) Any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery distilled spirits in the ordinary course of its business as a common carrier."

§ 2810, Title 26, U. S. C.

"Registry of stills.
Requirement.

Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner. Stills and distilling apparatus shall be registered immediately upon their being set up.

Every still or distilling apparatus not so registered, together with all personal property in the possession or custody, or under the control of such person, and found in

the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited.

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years."

§ 2833, Title 26, U. S. C.

"Distilling without giving bond.
Penalty and forfeiture.

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclo-

sure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States."

§ 2834, Title 26, U. S. C.

"Mash, wort, and vinegar; vinegar factories.

No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and (except in the case of vinegar) the tax thereon paid. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. Nothing in this section shall be construed to apply to fermented liquors, or to fermented liquids used for the manufacture of vinegar exclusively. But no worm, goose-neck, pipe, conductor, or contrivance of any description whatsoever whereby vapor might in any manner be conveyed away and converted into distilled spirits, shall be used or employed or be fastened to or connected with any vaporizing apparatus used for the manufacture of vinegar; nor shall any worm be permitted on or near the premises where such vaporizing process is carried on.

Nor shall any vinegar factory, for the manufacture of vinegar as aforesaid, be permitted, except as provided in

section 2835, within six hundred feet of any distillery or rectifying house. But it shall be lawful for manufacturers of vinegar to separate, by a vaporizing process, the alcoholic property from the mash produced by them, and condense the same by introducing it into the water or other liquid used in making vinegar.

No person, however, shall remove, or cause to be removed, from any vinegar factory or place where vinegar is made, any vinegar or other fluid or material containing a greater proportion than 2 per centum of proof spirits. Any violation of this provision shall incur a forfeiture of the vinegar, fluid, or material containing such proof spirits, and shall subject the person or persons guilty of removing the same to the punishment provided for any violation of this section.

And sections 2827, 2828, and 2830 shall apply to all premises whereon vinegar is manufactured, to all manufacturers of vinegar and their workmen or other persons employed by them. 53 Stat. 319."

Amendment IV to the Constitution of the United States.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 174—October Term, 1956.

(Argued December 10-11, 1956

Decided February 14, 1957.)

Docket No. 24372

—o—

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO CHIEPPA, ABE IVICOLA, ANTHONY PETTI, and JOSEPH D. POLVERINO,

Appellants.

—o—

Before:

SWAN, MEDINA and WATERMAN,

Chief Judges.

Appellants appeal from jury verdicts of guilty and judgments thereon, S. D. N. Y., Holtzoff, *Judge*. Affirmed.

PAUL W. WILLIAMS, United States Attorney (Robert Kirtland, Asst. United States Attorney, of counsel), *for Appellee.*

LOUIS BENDER, New York City, *for Defendants-Appellants.*

WATERMAN, *Circuit Judge*:

Angelo Chieppa, Abe Ivicola, Joseph Polverino, and Anthony Petti appeal from judgments of conviction for sev-

eral offenses relating to the operation of an illicit distillery. One count charged a conspiracy under 18 U. S. C. §371, whereas the other counts charged substantive violations of the Alcohol Tax Laws under former 26 U. S. C. §§2833, 2810, 2834, and 2803(a), Int. Rev. Code of 1939. Chieppa and Polverino were charged on all counts of the indictment. Ivicola and Petti were charged only on the conspiracy count and on one substantive count. The appellants were tried along with several other defendants who, for various reasons, are not before us on appeal.

One of the defendants below, Indian Hills Farms, Inc., of which one Michael Clemens was president, owned a farm outside of Southfields, New York. Mr. Clemens and his wife occupied the main house, which was over half of a mile back from the highway. A small tenant house and a barn were located about 1200 feet behind the main house.

According to his own testimony, Agent Lane of the Alcohol and Tobacco Tax Division was instructed by another agent to appear at the Newburgh office of that bureau between two and three o'clock in the morning of August 18, 1953. At 6:30 A. M. of the same day, in the company of other Treasury agents and several state troopers, Lane, without a search warrant or warrant for arrest, entered the farm through the front entrance, drove past the main house, and parked near the barn. As his car approached the small tenant house, he saw one of the defendants—not an appellant here—running from that building toward the barn and up a hillside. Three other agents set out in pursuit. Another defendant was then seen coming out of the barn and running in the same direction as the first. Lane got out of his car and then smelled an odor that he claimed to recognize as fermenting mash and cooking alcohol. He also saw vapors rising from the ground near the barn. He went to the door of the barn, looked inside, and saw a copper column still, five-gallon cans, and alcohol running into a large receiving tank. Thereupon Lane took up the chase after the two defendants mentioned above. He

eventually caught up with them and placed them under arrest.

Later in the same day, about 11:00 A. M., a state trooper who had been stationed on the farm about half way between the entrance and the barn signalled an approaching car to stop. Appellants Chieppa and Polverino, and another defendant, were its occupants. The trooper entered the car and directed the driver to the place where the other defendants were being held by the Treasury agents. He then turned them over to Agent Lane, who placed them under arrest. Lane then searched the car, finding a carton on the floor containing a can of soda and various plumbing fittings. He testified at the trial that these articles were of a type commonly used in distilleries. He also testified that Chieppa at the time of the arrest claimed to have borrowed the car solely to take a ride, and that Polverino had joined him in order to share that pleasure.

All the defendants, except Indian Hill Farms, Inc., have repeatedly disclaimed any interest, either possessory or proprietary, in the barn and its contents. The owner and president of Indian Hill, Michael Clemens, died a year before this case came on trial, which was held three years after the "raid" by the Treasury agents. Appellants Chieppa and Polverino also deny that they had any interest in either the car or the contents of the car in which they were apprehended.

I

The appellants here contend that the trial court erred in admitting as evidence photographs of the still equipment found in the barn and samples of mash taken from the vats in the barn. They also claim error in admitting photographs of the plumbing fittings found in the car in which Chieppa and Polverino were apprehended. These objections were urged for the first time at trial upon the introduction of this evidence by the Government. In support thereof, the appellants claimed that the "raid" on the farm constituted an illegal search and seizure because it was undertaken with-

out either a search warrant or a warrant for arrest. They also assert that the arrest of Chieppa and Polverino was illegal. The appellants rely heavily on the decisions of the Supreme Court in *McDonald* v. *United States,* 335 U. S. 451 (1948) and *Johnson* v. *United States,* 333 U. S. 10 (1948). The Government, on the other hand, contends that the search of the barn was incident to a valid arrest and therefore permissible.

We expressly decline to pass upon the validity of the "raid" and the ensuing search and arrests. The trial judge overruled the objections to this evidence made for the first time at trial on the ground that the defendants had waived whatever rights they might have had by failing to make a timely motion under Rule 41(e)[1] to suppress the evidence before trial.

In their attack on the trial court's ruling, the appellants allege, *inter alia,* that they lacked the necessary knowledge to make a motion to suppress before trial. This argument is untenable insofar as it is directed at the photographs of the plumbing fittings, because Chieppa and Polverino were

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[1] Rule 41(e) of the Federal Rules of Criminal Procedure reads as follows:

> "*Motion for return of property and to suppress evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

present at the time the car containing the fittings was searched. If they were unaware of the lack of a warrant, they could have easily acquired that information far in advance of the trial. Since they had at least a possessory interest in the contents of the car, they were entitled to move for their return and suppression as evidence. See *Steeber* v. *United States,* 198 F. 2d 615, 617 (10th Cir. 1952); *Daddio* v. *United States,* 125 F. 2d 924, 925 (2d Cir. 1942).

As for the photographs of the interior of the barn and the samples of mash, the appellants claim that they did not have a sufficient interest in the barn or its contents to invoke Rule 41(e) before trial. They contend, however, that they had standing to object to the admission of this evidence at trial because it was prejudicial to them. In support of this novel position, the appellants appear to rely on *McDonald* v. *United States,* 335 U. S. 451 (1948). But we do not construe that case as a deviation from the established rule, because there the party with the necessary interest in the property, McDonald, had in fact made a timely motion for suppression prior to trial. Before holding the admission of certain evidence prejudicial to the defendant Washington, McDonald's guest, the Supreme Court first found error in the denial of McDonald's motion. In the case at bar there was no pre-trial motion by any of the defendants and hence no underlying error the effects of which could be considered prejudicial to the appellants. The defendant Indian Hill Farms, or someone acting in its behalf, had ample time to make a motion to suppress prior to the trial. Michael Clemens, who must have been aware of the "raid," died a year before trial, but two years after the "raid," during which time he made no effort to invoke Rule 41(e). Nor did the successor to his interest in Indian Hill attempt to utilize this provision.

In view of these facts, we hold that the trial court properly declined to exercise its discretion under Rule 41(e), and therefore no error occurred. *United States* v. *Sansone,* 231 F. 2d 887 (2d Cir. 1956); *United States* v. *Salli,* 115 F. 2d 292 (2d Cir. 1940).

II

Appellants Chieppa and Polverino also allege error in the admission of certain testimony by Joseph J. Jones, the principal witness for the Government. Jones testified roughly as follows: He had been employed by Mr. Clemens as a caretaker for Indian Hill Farms. During the course of the employment Clemens made an arrangement with the other defendants whereby they were to use his premises for the installation and operation of an illegal still. The witness was required to perform many menial chores in the construction and maintenance of the still. The other defendants played roles of varying significance in this undertaking.

The specific testimony to which appellants Chieppa and Polverino object related to a conversation between Jones and the appellants Ivicola and Petti. According to this testimony, about four days after the "raid" Jones was approached by these two appellants and instructed by Ivicola "not to talk to any Federal agents." Jones was further told that in exchange for his silence he would "be taken care of." Appellants Chieppa and Polverino argue that the testimony was inadmissible against them, since the conspiracy for which they were charged was terminated at the time of the "raid" and the ensuing arrests. Therefore the statement made by Ivicola could not be admitted against parties not present at the time of its making because it was not made in furtherance of the conspiracy. *Krulewitch* v. *United States*, 336 U. S. 440 (1949); *Fiswick* v. *United States*, 329 U. S. 211 (1946); see *Paoli* v. *United States*, 77 Sup. Ct. 294, 297-98 (1957).

The conversation here testified to is remarkably similar in both its content and surrounding circumstances to that held erroneously admitted in *Krulewitch*. There the complaining witness, who, as in the case at bar, was also an accomplice but not a defendant, related a conversation wherein an alleged co-conspirator of the appellant instructed the witness not to divulge any information to the police. The Supreme Court rejected the argument that

an implicit subsidiary phase of the original conspiracy was an agreement to conceal that conspiracy:

> "The rule contended for by the Government could have far-reaching results. For under this rule plausible arguments could generally be made in conspiracy cases that most out-of-court statements offered in evidence tended to shield co-conspirators. We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence." *United States* v. *Krulewitch*, *supra*, at 444.

We believe that the rule announced in *Krulewitch* applies to the facts of this case and that the trial court committed error in admitting this testimony against the appellants Chieppa and Polverino. There was nothing exceptional about this conspiracy to warrant a conclusion that it continued past the "raid" and the arrest, nor is there any evidence, other than the clandestine attitude of all conspirators, that part of the original conspiracy was an agreement to conceal the evidence of that conspiracy. The case at bar is thus clearly distinguishable from *United States* v. *Grunewald*, 233 F. 2d 556 (2d Cir. 1956), *cert. granted*, 352 U. S. 866 (1956).[2]

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[2] In *Grunewald*, this court relied on three theories of evidence as proof of a continuing conspiracy to "fix" taxes after the last actual "fix" occurred. (1) Certain activities of the defendants indicated that they continued to conduct "business as usual"; (2) the nature of the conspiratorial objectives required that the defendants protect their clients from income tax prosecutions even after the favorable rulings were obtained in their behalf and thus these rulings were only a "substantial installment" of the consideration bargained for; (3) the defendants committed a number of overt acts after the last "fix" from which the jury could reasonably infer that the original conspiracy to fix taxes expressly included an agreement to conceal evidence of that conspiracy. None of these elements are presented in the case at bar. For a discerning analysis of the relationship of the *Grunewald* case to the *Krulewitch* doctrine, see Note, *The Grunewald Case*: Problems of Conspiracy and Self-incrimination, 56 Colum. L. Rev. 1216 (1956).

Although we find that the admission of this particular testimony was error, we will not order a reversal solely on the ground of that error if it was "harmless," *i.e.*, if it did not affect "substantial right." Rule 52(a) of the Federal Rules of Criminal Procedure. In *Kotteakos* v. *United States*, 328 U. S. 750 (1946), the Supreme Court set forth the following broad formulation of "harmless error."

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. *Bruno* v. *United States, supra*, at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos* v. *United States, supra*, at 764-65.

We think that in the particular trial setting of this case the single cryptic reference by Jones to the efforts of two of the appellants to suppress evidence of their activities did not affect the "substantial rights" of the two appellants who were not present. Its admission therefore was "harmless error" within the meaning of Rule 52(a).

This error was harmless because the Government's case was overwhelming and hence the "record fairly shrieks the guilt" of all the appellants. *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953). As in *Lutwak*, "we have found only one instance where a declaration made after the con-

spiracy had ended was admitted against all of the alleged conspirators, even though not present when the declaration was made," and therefore "we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict." *Ibid.*

There is not the slightest doubt that an illegal still was being operated on the premises of Indian Hill Farms at the time of the "raid," a fact that even the defendants' lone witness, Mrs. Jean Clemens, the widow of Michael Clemens, eventually conceded. Ample testimony by several uncontradicted Government witnesses linked appellants Chieppa and Polverino with the conspiracy. Shortly after the raid they were apprehended on the private premises of this remote farm in a car filled with equipment that was obviously intended for use in the operation of the still. In addition, Jones testified to many occasions on which he received instructions from these two appellants relative to the construction and operation of the still. According to his testimony, which was not effectively impeached by defense counsel, Chieppa and Polverino were frequently on the farm during the construction of the still and actually participated in its installation. Neither appellant offered any persuasive evidence of his innocence. Indeed, the only witness for the defense, Mrs. Clemens, the wife of the owner of the farm, recounted an incredible tale to the effect that the defendants were constructing a swimming pool, not a still, on her husband's property; that the farm was leased to tenants who could not be found at their alleged address; and that she would give any testimony in court that a lawyer advised, even if she thought it to be false, because an attorney "knows the law better than me."[3]

Because we believe that no reasonable jury could have acquitted the appellants on the basis of the evidence pre-

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[3] For an evaluation of Mrs. Clemens' testimony, see *United States v. Chieppa*, 146 F. Supp. 268, 270 (S. D. N. Y. 1956).

sented below, we hold that the admission of this conversation against all of the appellants was "harmless error." See *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (2d Cir. 1952), *cert. denied*, 344 U. S. 864 (1952).

III

The appellants also allege error in the trial court's charge to the jury, but we think that this claim is entirely without merit.

Affirmed.

Order Granting Stay

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 24372

—o—

UNITED STATES OF AMERICA,

Appellee,

v.

ABE IVICOLA, ANGELO CHIEPPA, ANTHONY PETTI, and JOSEPH D. POLVERINO.

Appellants.

—o—

Appellants' petition for rehearing filed February 28, 1957 has been considered, and the petition is denied.

Appellants' motion that the bail of each appellant be continued pending application for writ of certiorari to the U. S. Supreme Court, and for a stay of our mandate pending such an application, is granted.

THOMAS W. SWAN,
HAROLD R. MEDINA,
STERRY R. WATERMAN,
U. S. C. JJ.

Filed March 11, 1957.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of February one thousand nine hundred and fifty-seven.

Present:

HON. THOMAS W. SWAN,
HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANGELO CHIEPPA, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

Office - Supreme Court, U.S.
FILED
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JOHN T. FEY, Clerk

No. 902

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

ABE IVICOLA, ANGELO CHIEPPA, ANTHONY PETTI, and JOSEPH D. POLVERINO,

Appellants.

PETITION FOR REHEARING APPEAL AND/OR STAY OF THE MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR WRIT OF CERTIORARI

I.

Appellants above named respectfully petition this Honorable Court for a rehearing in the appeal in the above entitled matter, and if denied, for a stay of the mandate and a continuance of bail pending an application for writ of certiorari.

This petition addresses itself solely to three features of this Court's decision, wherein it is believed this Court overlooked certain facts, and in particular a significant decision of the Supreme Court of the United States and a prior decision of this Court, which may be sufficient to induce this Court to review its prior opinion and redetermine the appeal in favor of a reversal of the judgment below.

This Court conceded that there was error committed below in admitting testimony of a conversation between Government witness Joseph J. Jones and two of the appel-

UNITED STATES COURT
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lants, Ivicola and Petti, after the conspiracy had ended. This Court, however, considered the error harmless because, as it said, "The Government's case was overwhelming * * *" (at p. 615).

Equally tainted, but apparently completely overlooked, was the admission against all appellants of the testimony of Government witness Joseph J. Jones of a conversation he had with defendant Clemens prior to his decease, but after the conspiracy had ended, and in the absence of any of the appellants.

The witness Jones, after detailing his conversation with appellants Ivicola and Petti after the conspiracy ended, stated as follows:

> "Q. What was your discussion with Mr. Clemens on this subject and when did that take place? A. It took place on the same week, the weekend I am quite sure. I was a little shaky about the matter. I asked Mr. Clemens what he thought of the situation I was in. He said it would only be a matter of a year in prison and if I should talk to the agents, the hoodlums were a bad bunch.
>
> Mr. Brodsky: I again move for the withdrawal of a juror and a declaration of a mis-trial.
>
> The Court: Motion denied.
>
> Q. Was there any further discussion at that time? A. No." (48a-50a)

The trial court admitted this testimony against all of the appellants on the same basis as he admitted the testimony of Jones' conversation with appellants Ivicola and Petti, namely, that this was a statement in furtherance of the conspiracy.

Without question, this testimony is of an identical nature as the other and was likewise erroneously admitted

under the prohibition laid down in *United States* v. *Krulewitch*, 336 U. S. 440, 444 (1949).

This testimony, where one defendant characterized these appellants as "hoodlums" and a "bad bunch", and further the clear implication that all were guilty of this crime, was much more damaging and prejudicial in its content than the other conversation. The impact upon a jury of both of these statements was to seriously prejudice any possible chance of a fair trial before this jury.

In indicating the overwhelming nature of the evidence in the record and the guilt of the appellants, this Court overlooked the fact that the Government witness Joseph J. Jones was the most important witness who identified all of the appellants, and without whose testimony the other links would have been completely insufficient to establish guilt. Indeed, this Court indicates that his testimony "• • • was not effectively impeached by defense counsel, • • •", but what was overlooked by this Court is that Jones had given a prior statement (Defendants' Exhibit 1) which completely contradicted his testimony on the stand with regard to the still itself and the participation of the appellants (Tr. of Record 417). Moreover, during his Army period, he was treated for nervous disorders in the Army General Hospital (Tr. of Record 403). He was AWOL and was court-martialed (Tr. of Record 402). He mistook defense counsel John T. Mazzeo for a Mr. Louis Werner on a visit to him on August 30, 1953 (Tr. of Record 407, 412, 418-419). Jones was anything but a believable witness. Consequently, the admission of the erroneous but highly prejudicial testimony could have been sufficient to have resulted in the convictions.

In contending that the materials found in the car driven by appellants Chieppa and Polverino "was obviously intended for use in the operation of the still", this Court further overlooked the cross-examination of Government Agent Benjamin L. Lane indicating that this equipment

was equally usable in legitimate industry, and further the admission of Government Agent Lane that Chieppa was a salesman for a fuel oil company (35A-37A).

II.

This Court stated in its opinion that "the Government, on the other hand, contends that the search of the barn was incident to a valid arrest and therefore permissible" (p. 610). It would be a reasonable inference from this statement that this Court believed the Government was attempting to sustain the "raid" and the search of the barn, as well as the search of the car in which Chieppa and Polverino were, on the merits. This Court thus completely overlooked its prior decision in *United States* v. *Di Re,* 159 F. 2d 818, 820, where Judge Learned Hand stated:

> "The prosecution has not upon this appeal attempted to support the competency of the coupons on the ground that Di Re did not apply for their suppression before the cause came on for trial. It has done well not to do so, because it abandoned any such objection when it undertook, * * * to defend the search upon the merits."

III.

In interpreting *McDonald* v. *United States,* 335 U. S. 451 (1948), to the effect that that opinion did not intend to permit a defendant who had no proprietary and possessory interest in the barn or the articles seized to object to them, this Court completely overlooked *United States* v. *Jeffers,* 342 U. S. 48 (1951). Defendant Jeffers had no proprietary or possessory interest in the room that was searched without a warrant. The Government argued that the search did not invade his privacy and that he lacked the necessary standing to suppress the evidence. The Court held:

> "To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right. The respondent unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a property interest therein."

In this regard, this Court was in error in stating that appellants Chieppa and Polverino denied any interest in the contents of the car in which they were apprehended (p. 609). The record is clear that it was only the car that was borrowed by Chieppa (24A-25A).

IV.

Circuit Court Judge Jerome N. Frank granted bail to all of the appellants in the sum of $5,000 pending the decision of this Court on the appeal, in an opinion dated September 20, 1956. In the event that this petition is denied, it is respectfully submitted that serious questions exist to warrant an application to the Supreme Court for a writ of certiorari. This is the intention of all the appellants. It is, therefore, respectfully requested that pursuant to Rule 46(a)(2) of the Federal Rules of Criminal Procedure, bail be continued pending application to the Supreme Court in accordance with the local rules of this Court.

For the foregoing reasons, this petition for rehearing, or in the alternative for a stay of the mandate and a continuance of bail, should be granted.

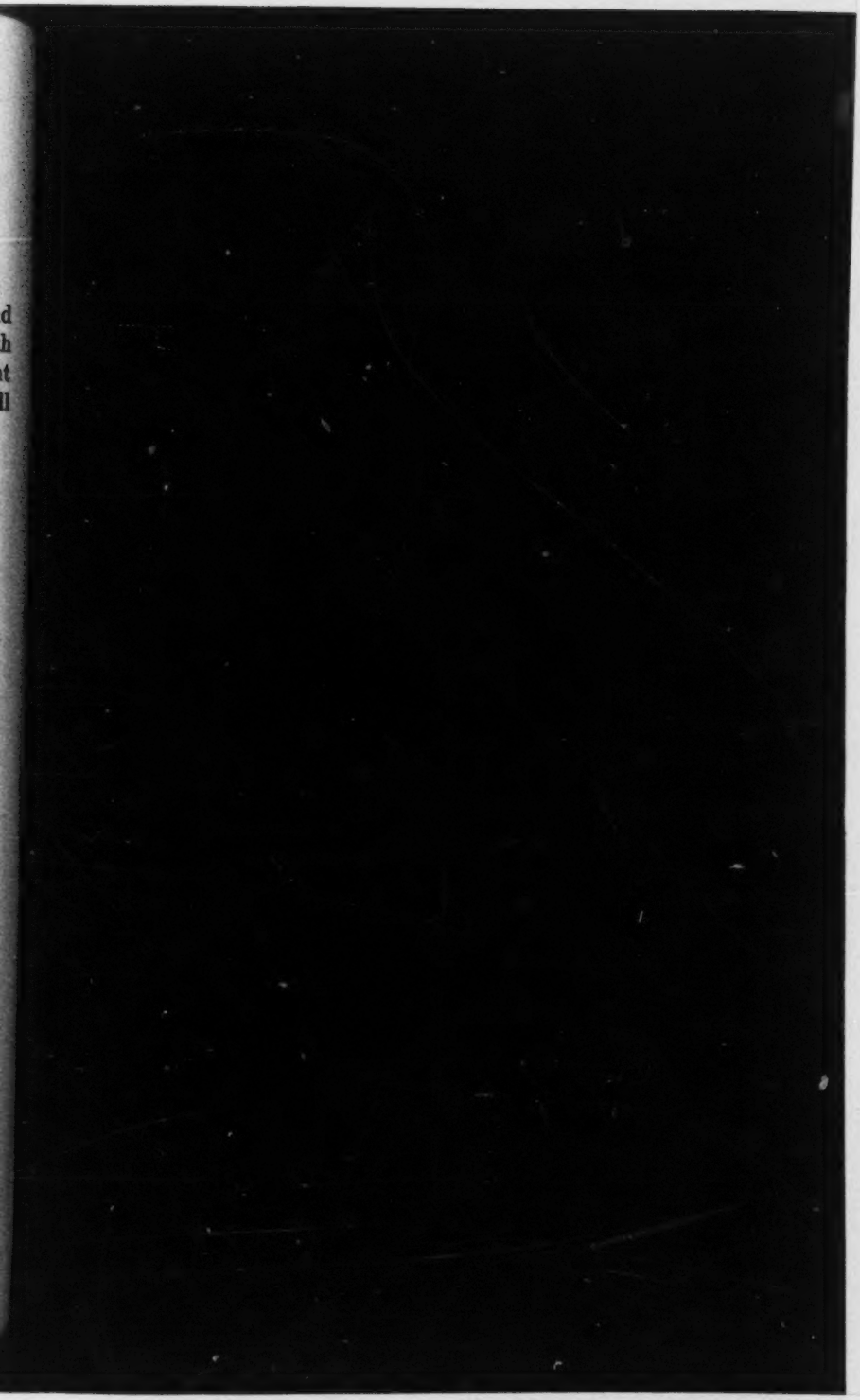
Louis Bender,
Attorney for Appellants,
Office & P. O. Address,
170 Broadway,
Borough of Manhattan,
City of New York.

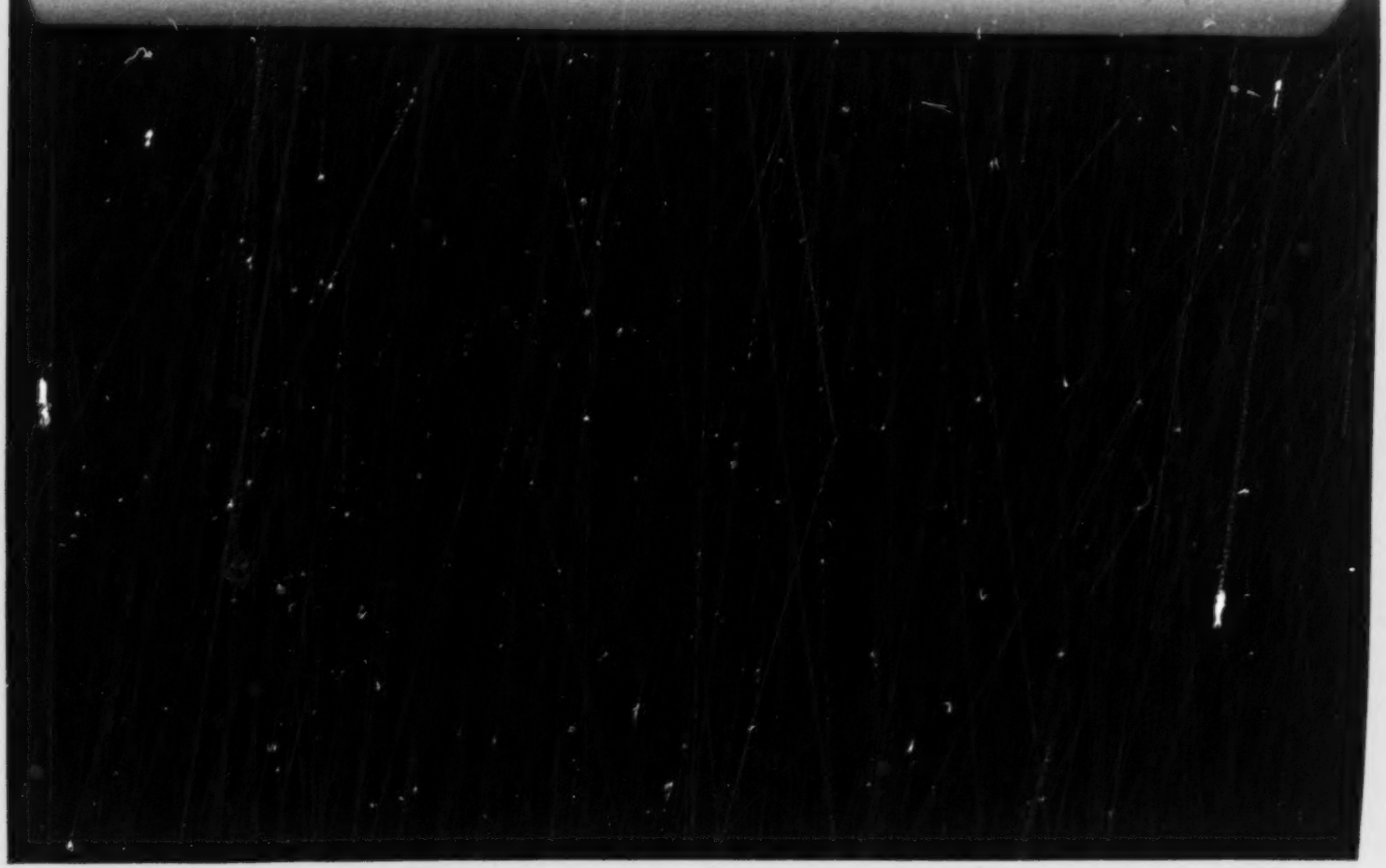
Certificate of Counsel

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LOUIS BENDER, being duly sworn on oath, certifies and says that he makes this certificate in compliance with Rule 28 of the Rules of this Court; that in his judgment the within and foregoing petition for rehearing is well founded and not interposed for delay.

LOUIS BENDER.





INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Rules involved	2
Statement	3
Argument	7
Conclusion	14

CITATIONS

Cases:

Agnello v. *United States*, 269 U.S. 20	11
Amos v. *United States*, 255 U.S. 313	9
Baskerville v. *United States*, 227 F. 2d 454	10
Butler v. *United States*, 153 F. 2d 993	12
Contee v. *United States*, 215 F. 2d 324	9
Goldstein v. *United States*, 316 U.S. 114	10, 11
Gouled v. *United States*, 255 U.S. 298	9
Hester v. *United States*, 265 U.S. 57	7, 10
Kotteakos v. *United States*, 328 U.S. 750	13
Lagow v. *United States*, 159 F. 2d 245, certiorari denied, 331 U.S. 858	10
Lutwak v. *United States*, 344 U.S. 604	13, 14
McDonald v. *United States*, 335 U.S. 451	11
Scoggins v. *United States*, 202 F. 2d 211	10
Segurola v. *United States*, 275 U.S. 106	9
Shurman v. *United States*, 219 F. 2d 282	10
United States v. *Jeffers*, 342 U.S. 48	10, 12
United States v. *Salli*, 115 F. 2d 292	9
United States v. *Sansone*, 231 F. 2d 887, certiorari denied, 351 U.S. 987	9
Wrightson v. *United States*, 222 F. 2d 556	10

Statutes and Rules:

Alcohol Tax Laws, former 26 U.S.C. 2803(a), 2810, 2833, and 2834, Internal Revenue Code of 1939	3
Federal Rules of Criminal Procedure:	
Rule 41	2, 10
Rule 41e	2
Rule 52	3
Rule 52a	3, 13

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 902

ABE IVICOLA, ANGELO CHIEPPA, ANTHONY PETTI, AND JOSEPH D. POLVERINO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 31-40) is reported at 241 F. 2d 635.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1957 (Pet. 42) and a petition for rehearing was denied on March 11, 1957 (Pet. 41). The petition for a writ of certiorari was filed on April 10, 1957. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in refusing to entertain a motion to suppress, first made at trial.

2. Whether the Court of Appeals erred in applying the "harmless error" rule to the erroneous admission at trial, against all defendants, of statements made by some of them after the conspiracy had terminated.

RULES INVOLVED

Rule 41, Federal Rules of Criminal Procedure, provides in pertinent part:

> (e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in

> the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Rule 52, Federal Rules of Criminal Procedure, provides in pertinent part:

> (a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

A five-count indictment filed in the District Court for the Southern District of New York charged petitioners, and ten other defendants (one of them a corporation), with conspiring to violate the laws relating to liquor. Petitioners were also charged with various substantive violations of the Alcohol Tax Laws, former 26 U.S.C. 2803(a), 2810, 2833, and 2834, Internal Revenue Code of 1939 (R. 1a-6a).[1]

Eleven of the fourteen defendants went to trial, one having been severed from the case on motion by the government (Tr. 5)[2] and two, including a Mr. Clemens, who was an officer of the corporate defendant, having died after the return of the indictment (Tr. 29). Two pleaded guilty to certain counts during the course of the trial (Tr. 70). A verdict of not guilty was

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[1] "R." refers to the printed appendices below, which are part of the record filed with this Court. The record pagination is from 1 through 75, then 1a through 111a.

[2] The designation "Tr." refers to the transcript of the trial proceedings.

directed as to Mrs. Clemens, an officer of the corporate defendant (Tr. 522). The jury found the other eight defendants (including the corporation) guilty as charged (R. 60-67; Tr. 669).

Sentences imposed upon petitioners were as follows: Ivicola received two years on count 1 (conspiracy), and two years and a fine of $1,000 on count 2 (carrying on the business of a distiller without giving bond), the sentences to imprisonment to run concurrently; Chieppa, two years on the conspiracy and each of four substantive counts, to run concurrently, and various fines and penalties totalling $2,100; Petti, eighteen months on counts 1 and 2, to run concurrently, and a fine of $100; Polverino, two years on the conspiracy and each of four substantive counts, to run concurrently, and fines and penalties totalling $1,200 (R. 3-4; Tr. 708-711). On appeal the convictions were affirmed (Pet. 42).

The evidence may be summarized as follows:

1. One of the defendants below, a corporation named Indian Hills Farm, Inc., of which Michael Clemens (who died before trial (Tr. 29)) was president, owned a farm outside of Southfields, New York (R. 5, 40, 52; Tr. 484). The main house on the farm, which was occupied by Mr. and Mrs. Clemens (R. 31), was located about 5/8 of a mile from the highway (R. 30). A small tenant house and a barn were located some 1200 feet further into the property from the highway (R. 32; Tr. 58).

At about 6:30 a.m., on August 18, 1953, federal agents and members of the New York State Police drove into the farm and up to the tenant house and barn (R. 5-6, 29, 7a). As the raiding party pulled up, defendant

Falanga ran out of the tenant house, past the barn, and up the hillside. As he passed the barn he was joined by defendant Siematowski, who emerged from that building (R. 6). Meanwhile, as Agent Lane got out of the car, he noticed a strong odor of fermenting mash and cooking alcohol, and observed vapors rising from the ground near the barn (R. 6-7). Glancing inside the barn through the door left open by Siematowski, Lane saw a large still in operation (R. 7, 9). Lane then joined in the chase and was the officer who ultimately made the arrest (R. 7).

At about 1:00 p.m. on the day of the raid (R. 21; Tr. 130), an automobile drove into the farm and proceeded toward the building where the still was located. A New York state trooper stopped the vehicle at a point about half-way between the farm entrance and the still (R. 41). He found petitioners Chieppa and Polverino, and defendant Fabiano in the car (R. 42). He also found various items of use in a distillery—plumbing fittings, a length of rubber hose, and cans of caustic soda and phosphate of lime—in the rear seat and trunk of the automobile (R. 22-24; Tr. 90-91, 160).

Joseph Jones, the caretaker at the farm, testified that in the early part of July 1953, he was asked by Mr. Clemens to move out of the tenant house near the barn. In the presence of Clemens, and defendant Siematowski, petitioner Ivicola said they were "* * * going to make some apple" (R. 15a, 16a, 18a, 21a, 24a). Thereafter, an extension was added to the barn, a mash pit dug, the still constructed, and operations begun (R. 24a-27a, 34a-35a; Tr. 227). All of the petitioners participated in the work which was directed by Chieppa (Tr. 238). Petitioner Petti assisted in unloading sugar and in loading alcohol (R. 43a). Ivicola aided Chieppa

in prevailing upon the caretaker to assist in operating the still (R. 27a-29a, 33a-34a). Ivicola and Polverino were present at the still and helped unload sugar (R. 42a, 51a).

2. No motion to suppress evidence resulting from the raid was made by any of the defendants prior to trial, although the raid took place almost three years prior thereto, and the indictment was returned nine months prior to trial (R. 14). None of the defendants, including petitioners, claimed any possessory or proprietary interest in the still either before or at the time of trial.

Mr. and Mrs. Clemens, officers of Indian Hill Farm, Inc., which owned the farm, had, after the raid, denied that they personally, or as officers, knew of the existence of the still, claiming that the tenant house and barn had been leased during the time in question (R. 57a-58a; Tr. 552).[3] Evidence offered on behalf of Ivicola, Chieppa, and Petti indicated that their presence at the farm was related to business undertakings which were totally unrelated to the still (R. 59a-63a).

At trial, objection was made by the attorney for Indian Hill Farm, Inc., and Mrs. Clemens (R. 7-8) to the introduction into evidence of photographs of the distillery equipment and cans of alcohol on the ground that they were derived from an unlawful search (R. 13). The objection was overruled (R. 14), the court stating:

> Objection overruled. In so far as the first objection [that the evidence was unlawfully obtained] is concerned, first, there is no proof that there has been a seizure. Second, if there were and it is claimed the seizure was illegal, it was incumbent

[3] The alleged lessee could not be found (R. 58a-59a).

upon the defendants to make a motion to suppress prior to the trial and there has been plenty of time to do so since the indictment was returned in November, 1955.[4]

When objection was subsequently made on behalf of Indian Hill Farm, Inc., to testimony as to what had been observed during the raid, the court again pointed out that the validity of the search should have been raised before trial (R. 39-40).[5]

No question of unlawful search and seizure was raised in the trial court to the items found in the car occupied by Chieppa and Polverino at the time of their arrest. The only objection was that there was no foundation for photographs of the car and that testimony of the agent as to what he saw in the car was not "the best evidence" (R. 22).

ARGUMENT

1. As to the evidence relating to the still in the barn, at no time before, during, or after trial did these petitioners move, in their own behalf, to have this evidence suppressed. At no time did they claim a possessory

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[4] Earlier in the trial, when objection was made to the agent's statement of what he saw as he drove up, the court had mentioned the case of *Hester* v. *United States* (265 U.S. 57), (Tr. 58) but the court's specific ruling on the objection to the photographs was as set forth in the text (see Tr. 75-77).

[5] After trial, on argument of a motion for bail pending appeal, the trial judge indicated that he thought the search was valid because the agents were first on open land, and did not enter the barn until after they had probable cause to believe that there was a still in operation (R. 56, 59). He stated that the "search and seizure point is completely answered by the proposition that there was no motion made to suppress, and there is not sufficient reason presented for not making a motion before trial. Moreover, the point itself, even if open, is lacking in merit."

interest in either the property or the still. None of them was even present on the scene when the barn was entered on the morning of August 18, 1953.[6] Apparently on the basis of the ruling by the trial court that objection by one defendant would be available to all (Tr. 72), they sought on appeal and seek here to raise the contention that the motion to suppress made during trial by Indian Hill Farm, Inc. should not have been overruled, and that they should have the benefit of a ruling which they claim should have been made in favor of Indian Hill Farm, Inc., even though the corporation did not appeal. The contention is without merit, both because the ruling as to the corporate defendant was proper and because, in any event, petitioners have no standing to contest the validity of the search.

(a) Petitioners argue that the trial court erred in overruling the motion to suppress made by Indian Hill Farm, Inc. during trial on the ground that the motion should have been made before trial. They contend that the judge had a duty to inquire why the motion was not made before trial.

The short answer to this argument is that the trial judge expressly referred to the long period of time which elapsed between the raid and the time of trial, and the very substantial time period between the return of the indictment and trial (R. 14). In fact, when counsel for the corporation attempted to explain the failure to move by disclaiming interest in the still, the court pointed out that since the corporation was moving on the basis of an invasion of its property, it would have

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[6] As noted *supra* at p. 5, two petitioners drove up to the scene about one o'clock in the afternoon on the day of the raid.

had standing to move to suppress (R. 39-40). Certainly the corporation knew of the raid shortly after it took place since Mr. and Mrs. Clemens, corporate officers, were questioned on the day of the raid (R. 57a). It is a permissible inference from the colloquy of counsel that the failure to move to suppress was deliberate strategy on the part of the corporation, but in any event it is clear that there was opportunity to explain the delay.[7] Since no adequate reason for the failure to act was offered, the trial court properly refused to entertain the motion first made at trial. *Segurola* v. *United States*, 275 U.S. 106, 111-112; *United States* v. *Sansone*, 231 F. 2d 887, 892 (C.A. 2), certiorari denied, 351 U.S. 987; *United States* v. *Salli*, 115 F. 2d 292 (C.A. 2).[8]

Petitioners claim that the trial judge ruled on the merits of the search and seizure, and quote language used by him in talking with counsel in connection with an application for bail pending appeal (Tr. 851-852). At that time defense counsel conceded that the trial judge's ruling made during trial was grounded on fail-

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[7] *Contee* v. *United States*, 215 F. 2d 324 (C.A. D.C.), is of no aid to petitioners. In that case the defendant had been adjudged mentally incompetent shortly after his apprehension and spent nearly a year in a mental institution. The fact that no probable cause existed for the arrest was not developed until the arresting officer took the stand during the trial. Here, the facts were available from the time of the raid, and, while one corporate officer died a year before trial, but two years after the raid, the corporation which owned the property was a defendant fully capable of acting through counsel.

[8] Neither *Gouled* v. *United States*, 255 U.S. 298, nor *Amos* v. *United States*, 255 U.S. 313, is applicable here. In the former case, defendant objected on proper grounds as soon as he learned of the seized evidence. 255 U.S. at 305. In the latter case, the government itself conclusively established the illegality of the seizure.

ure to move, not on the merits of the search and seizure (R. 57). As noted in the Statement (*supra,* p. 7 fn. 4), during the trial the judge had mentioned the *Hester* case (265 U.S. 57) but had expressly predicated his ruling on the failure to move before trial.[9] The Court of Appeals concluded that the trial judge had overruled the objection because of failure to move promptly and for no other reason.

(b) Petitioners' position with respect to the alleged error in denying suppression is entirely dependent upon that of Indian Hill Farm, Inc. If Indian Hill Farm, Inc. had not moved to suppress the evidence at all, petitioners, who claimed no interest in the premises entered or the property seized, and who were not even present when the allegedly illegal search was made, would have had no standing to move to suppress.[10] *Baskerville* v. *United States,* 227 F. 2d 454 (C.A. 10); *Shurman* v. *United States,* 219 F. 2d 282 (C.A. 5); *Scoggins* v. *United States,* 202 F. 2d 211 (C.A. D.C.); *Lagow* v. *United States,* 159 F. 2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858; see *Goldstein* v. *United States,* 316 U.S. 114, 121. Since the ruling was not erroneous as to Indian Hill Farm, Inc., which has not appealed, *a for-*

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[9] Petitioners attempt to bolster their position by pointing to the statement by the same trial judge in passing on the merits of an untimely objection to seized evidence in *Wrightson* v. *United States,* 222 F. 2d 556, 561 (C.A. D.C.) that he would entertain a belated motion if he thought evidence unconstitutionally seized. This hardly detracts from his explicit statement of the basis for his ruling in this case. There is, of course, no requirement that the same trial judge exercise the discretion conferred by Rule 41 uniformly in all cases.

[10] In *United States* v. *Jeffers,* 342 U. S. 48, the defendant claimed a right in the property seized, the issue being whether he could have a sufficient property right to support his claim as to contraband.

tiori, it was not erroneous as to petitioners.[11] *McDonald* v. *United States,* 335 U.S. 451, on which petitioners rely to assert the rights of Indian Hill Farm, Inc., is therefore inapposite. Moreover, the opinion of Justice Jackson in *McDonald,* as to the availability of the suppression point to a co-defendant, was predicated on the ground that the co-defendant was present at the time of the illegal search and that "even a guest may expect the shelter of the rooftree he is under against criminal intrusion", 335 U.S. at p. 461. That ground is not available to these petitioners since they were not present at the time of the allegedly illegal entry.

Petitioners ask this Court to overrule the established principle, recognized by this Court in *Goldstein* v.

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[11] While, in view of the basis of decision by the courts below, the merits of the search are not in issue, it should be noted that there is no warrant for the implicit assumption of petitioners that the search was illegal. The mere fact that the agents drove up near the barn was not such a trespass as would render all subsequent acts illegal. *Hester* v. *United States,* 265 U.S. 57, and see *Agnello* v. *United States,* 269 U.S. 20, 28-30. Before the agent entered the barn, he had seen persons running therefrom, had smelled mash, and seen vapor arising from the mash. Under these circumstances he had reason to believe that a felony was then and there being committed and could properly enter the barn to see if anyone was still inside.

Moreover, it is not clear that the agent entered the barn before making the arrest. The following exchange took place early in the agent's testimony (R. 7):

The COURT: Where was the still?

The WITNESS: In the barn.

The COURT: You went inside the barn?

The WITNESS: I did, I opened the door and looked in the barn.

The witness then said that he joined the chase, made the arrests and took two captives back to the barn. He did not mention when it was that he went into the barn, whether before or after the arrest, and on a later occasion testified that the door was open when he looked in (R. 9).

United States, 316 U.S. 114, 121, and assumed in *United States* v. *Jeffers,* 342 U.S. 48, that only one claiming a possessory interest in the premises searched or the property seized has standing to move to suppress (Pet. 22-23). This is the purport of their argument that they should not be required to move to suppress before trial since an admission of interest in the property could be used against them at the trial. But the rule that an interest must be shown would be as applicable to a motion made during trial as before trial. Suppression is a method of vindicating personal rights which are guaranteed by the Fourth Amendment and one whose personal rights have not been invaded has no right to rely upon the fact that there has been an invasion of the rights of others. Since petitioners cannot establish a violation of their rights, they cannot invoke the rule of suppression.

(c) The legality of the seizure from the automobile occupied by Chieppa and Polverino cannot be questioned at this time. No motion to suppress was made prior to trial and no objection on this ground was made at trial. This afterthought was first mentioned before the Court of Appeals, and comes too late for consideration. *Butler* v. *United States,* 153 F. 2d 993, 994 (C.A. 10).

2. About four days after the raid, Jones was approached by petitioners Ivicola and Petti, who told him not to talk to the federal agents and that he would be taken care of (R. 49). A day or so later, Clemens told Jones that if Jones talked, " . . . the hoodlums were a bad bunch" (R. 50). The trial court admitted these statements on the theory that they were made in furtherance of the conspiracy. The Court of Appeals

held that the trial court's ruling was erroneous under *Krulewitch* v. *United States,* 336 U.S. 440, but that the error was harmless. Petitioners now urge that the Court of Appeals assessed the effect of the error in terms of whether the evidence was sufficient to satisfy the Court of Appeals that petitioners were guilty and not in terms of the impact of the error on the jury. This is what the Court of Appeals wrote (Pet. 38-40):

* * * * *

> This error was harmless because the Government's case was overwhelming and hence the "record fairly shrieks the guilt" of all the appellants. Lutwak v. United States, 344 U.S. 604, 619 (1953) * * *.
>
> * * * * *
>
> Because we believe that no reasonable jury could have acquitted the appellants on the basis of the evidence presented below, we hold that the admission of this conversation against all of the appellants was "harmless error".

It is clear that the Court of Appeals applied a proper test in determining that the error was harmless. Rule 52(a), Federal Rules of Criminal Procedure; *Kotteakos* v. *United States,* 328 U.S. 750; *Lutwak* v. *United States,* 344 U.S. 604.

The Court of Appeals in its opinion did not mention the conversation between Clemens and Jones. This omission was called to its attention by petitioners in their motion for rehearing, and strenuously argued there. The petition for rehearing was denied without

opinion, presumably on the theory that admission of this conversation as evidence was also harmless error.

Both conversations were essentially similar, and both would fall within the rationale of *Lutwak* v. *United States, supra.* Moreover, the inadmissible conversation between Clemens and Jones was almost identical to a conversation which they had during the life of the conspiracy, and which was admitted in evidence without objection. At that time Jones tried to withdraw from the operation of the still and was told by Clemens not to do so. Clemens told Jones that Jones " * * * should follow through with the hoodlums because they were a bad bunch" (R. 47a). Thus, the erroneous admission of their second similar conversation did not place any essentially new matter before the jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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